

***United States Court of Appeals  
for the Second Circuit***



**APPENDIX**





ORIGINAL

# 74-2538

In The  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

HYMAN RADZANOWER,

Plaintiff-Appellant,

-against-

TOUCHE, ROSS & CO., TELEPROMPTER CORPORATION,  
JACK K. COOKE, RAYMOND P. SHAFER, W.J. BRESNAN,  
H.J. SCHAFLY, LEONARD TOW, R.C. TODD, JR., B.P.  
SIMON, J.B. GREEN, L.H. READ, R.G. WILSON, H.E.  
FLAHERTY, B.D. FISCHMAN, BEFLE ADAMS, MARVIN  
CARTON, R.F. LEWIS, P.L. LOWE, CHARLES LUCKMAN,  
M.B. MITCHELL, A.E. PUCKETT, J.H. RICHARDSON,  
M.E. LIVINGSTON, JACK WRATHER, and FIRST NATIONAL  
BANK OF BOSTON,

Defendant-Appellee.

Appeal from Order of the United States District  
Court for the Southern District of New York

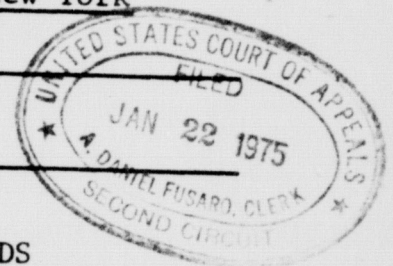
JOINT APPENDIX

DEBEVOISE, PLIMPTON, LYONS &  
GATES  
Attorneys for Defendant-Appellee  
First National Bank of Boston  
299 Park Avenue  
New York, New York 10017  
(212) 752-6400

IRA JAY SANDS  
Co-Counsel for Plaintiff-Appellant  
701 Seventh Avenue  
New York, New York 10036  
(212) 265-3500

AND

SAMUEL GOTTLIEB  
GAINSBURG, GOTTLIEB, LEVITAN  
& COLE  
Co-Counsel for Plaintiff-Appellant  
122 East 42nd Street  
New York, New York 10017  
(212) 697-3440



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DOCKET ENTRIES

DATE	
July 16-74	Filed Complaint. Issued Summons.
July 17-74	Filed order that Fred Berman of 701 Seventh Avenue, is designated to serve the summons and complaint in the above-entitled action, Clerk.
July 25-74	Filed pltff's affdvt. of Ira Jay Sands and notice of motion for an order for class determination. Ret. 8-6-74.
July 25-74	Filed pltff's memorandum of law in support of motion pursuant to Rule 23, FRCP.
July 30-74	Filed stip & order extending deft. Touche Ross & Co.'s time to answer to 9-4-74. So ordered - Cannella, J.
Aug. 2-74	Filed deft. Touche, Ross & Co.'s notice of taking deposition of pltff. on 8-13-74
Aug. 2-74	Filed deft. Touche, Ross & Co.'s interrogs., first set.
Aug. 5-74	Filed stip and order extending deft. Teleprompter Corp.'s time to answer from 8-4-74 to 9-4-74. So ordered-Cannella, J.



DOCKET ENTRIES

DATE

Aug. 5-74	Filed stip and order that pltff's motion for class determination presently retnble on 8-6-74 is adjourned to 9-6-74. So ordered - Cannella, J.
July 25-74	Filed summons and affdvts. of service of Fred Berman of summons and complaint on defts. T. Ross & Co. on 7-17-74, Teleprompter Corp. on 7-17-74 - B.D. Fishman & C. Luckman both on 7-17-74.
Aug. 13-74	Filed affdvt. of Fred Berman dated 7-17-74 of copy of summons and complaint of Barry Simon.
Aug. 13-74	Filed pltff's notice of taking deposition of deft. Barry P. Simon, etc. on 8-19-74.
Aug. 13-74	Filed pltff's notice to produce documents.
Aug. 15-74	Filed pltff's notice of taking depositions of the named defts. on the dates indicated.
Aug. 15-74	Filed affdvt. of service of Fred Berman of summons & complaint on Marvyn Carton on 7-17-74.

## DOCKET ENTRIES

DATE	
Aug. 19-74	Filed deft. Touche Ross & Co.'s affdvt. of Lawrence R. Eno and notice of motion for an order staying the depositions of all defts. by pltff, including the deposition of deft. Touche Ross & Co., etc., as indicated. Ret. 9-3-74.
Aug. 20-74	Filed deft. The First National Bank of Boston affdvt. of Philip A. Shaver and notice of motion for an order to dismiss as against said deft. Ret. 8-29-74.
Aug. 20-74	Filed memorandum of law in support of the motion of deft. The First National Bank of Boston to dismiss.
Aug. 20-74	Filed pltff's notice of taking deposition of Marvyn Carton on 8-24-74.
Aug. 26-74	Filed pltff's affdvt. of Ira Jay Sands and notice of motion for an order directing the manner in which certain defts. in this action are to be served with the summons and complaint. Ret. 9-4-74.



DOCKET ENTRIES

DATE

Aug. 28-74      Filed affdvt. of service of Fred Berman of a copy of the summons and complaint with Barry Simon on 7-17-74 and by service of mail to:

Hubert J. Schafly  
Hugh E. Flaherty  
Allen E. Puckett  
John H. Richardson

Sept. 3-74      Filed deft. Teleprompter Corp's affdvt. and show cause order to dismiss complaint and for protective order with a stay. Ret. 9-10-74 at 10:00 a.m. Conner, J.

Sept. 3-74      Filed Memorandum of deft. Teleprompter Corp in support of motions to dismiss complaint and for protective order and application for stay of discovery.

Sept. 3-74      Filed deft. Touche Ross & Co.'s answering affdvt. of Lawrence R. Eno.

Sept. 3-74      Filed stip & order extending the time for deft. Hubert J. Schafly to answer to 9-24-74. So ordered - Cannella, J.

DOCKET ENTRIES

DATE

Sept. 3-74	Filed stip and order-that deft. The First National Bank of Boston's motion to dismiss retnble on 8-29-74 is adjourned to 9-13-74. So ordered - Cannella, J.
Sept. 4-74	Filed memo endorsed on motion filed 8-26-74. Motion denied without prejudice to renewal upon proper papers, plttf. having failed to comply with General Rule 9 of this court. So ordered- Cannella, J. (m/n)
Sept. 4-74	Filed Summons and return - served the following:  <div style="margin-left: 40px;">First National Bank of Boston by H. James Williams, Jr. on 7-29-74 Raymond P. Shafer on 8-19-74 Jack Wrather by Pamela Smith on 8-8-74</div>
Sept. 5-74	Filed deft. Touche Ross & Co.'s notice of motion for an order, pursuant to Rules 12 (b) and 9 (b) FRCP, dismissing the complaint. Ret. 9-16-74.



## DOCKET ENTRIES

## DATE

Sept. 5-74	Filed memorandum of deft. Touche Ross & Co. in support of motion to dismiss complaint.
Sept. 5-74	Filed affdvt. of Lawrence R. Eno on behalf of deft. Touche Ross & Co. on the motion to dismiss the complaint by deft. Teleprompter Corp.
Sept. 5-74	Filed deft. Touche Ross & Co.'s supplemental answering affdvt. of Lawrence R. Eno on pltff's class action motion.
Sept. 5-74	Filed deft. Teleprompter Corp. affdvt. of Edwin J. Buckingham, III in response to pltff's motion for class action determination.
Sept. 9-74	Filed stip & order that all discovery of deft. First National Bank of Boston is adjd until 10 days after date of entry of an order determining the motion of First National to dismiss,....Cannella, J.

DOCKET ENTRIES

DATE

Sept. 11-74	Filed response and objections of deft. Touche Ross & Co. to pltff's Notice to produce documents.
Sept. 12-74	Filed Affidavit & Notice of Motion by deft. Hubert J. Schlafly for an order dismissing the complaint for failure to state a claim upon which relief can be granted etc. as indicated rtble before Cannella, J. on 9-20-74.
Sept. 12-74	Filed memo in support of motion to dismiss.
Sept. 12-74	Filed Endorsement & order that the within order of Conner, J. is hereby modified and amended so as to stay all discovery by pltff. until deft. Teleprompter Corp's motion to dismiss the complaint herein is heard and determined. Cannella, J.
Sept. 13-74	Filed Notice of Appearance and Demand that defts. Allen E. Puckett and John H. Richardson hereby appear in this action and that the firm of Milbank, Tweed, Hadley, & McCloy appear as attys for same, and that all papers etc. be served on them.



DOCKET ENTRIES

DATE

Sept. 12-74	Filed Endorsement & Order: Pltff's application for the entry of a default judgment is denied against deft. Barry P. Simon. The Court exercises its discretion to renewal at such time as pltff has shown a meritorious basis for this law suit. Application denied without prejudice, Cannella, J. M/N.
Sept. 13-74	Filed stip & order that the date on which defts. Allen E. Puckett & John H. Richardson must answer, etc., is extended to 9-20-74.
Sept. 16-74	Filed stip & order that and agreed by and between counsel, that the return date of all motions now pending before the Court is extended to 9-20-74, in chambers, Cannella, J.
Sept. 19-74	Filed deft's (Marvyn Carton) Notice of Joinder in motion to dismiss the complaint.
Sept. 19-74	Filed pltff's affdvt in opposition to motion of First National Bank of Boston to dismiss.

## DOCKET ENTRIES

DATE	
Sept. 19-74	Filed pltff's memorandum of law in opposition to the motion be deft. to dismiss.
Sept. 20-74	Filed Reply Memorandum of deft. the First National Bank of Boston, in support of its motion to dismiss.
Sept. 23-74	Filed affdvt. of Ira Jay Sands in opposition to motion to dismiss the complaint by deft's Touche, Ross & Co., Teleprompter Corp. and H. J. Schlafly.
Sept. 23-74	Filed memorandum of law of pltff in opposition to motions to dismiss.
Sept. 23-74	Filed notice of motion of deft's Puckett and Richardson for an order dismissing the complaint...Ret. 9-30-74
Sept. 23-74	Filed memo of deft's Puckett and Richardson in support of above motion.
Sept. 20-74	Filed stip and Order that the return date of various motions pending before the Court (Teleprompter Corp.) are adjourned to 9-20-74. Cannella, J.



DOCKET ENTRIES

DATE

Sept. 20-74	Filed stip and order that the return date of various motions now pending etc. (deft. First National Bank of Boston), are adjourned to 9-20-74. Cannella, J.
Sept. 20-74	Filed Affidavit of Service, by Steven L. Kroleski.
Sept. 20-74	Filed Pltff's response to Interrogs.
Sept. 24-74	Filed pltff's notice of motion for order directing service summons and complaint. Ret. 9-25-74.
Sept. 24-74	Filed pltff's memorandum in support of above motion.
Sept. 24-74	Filed additional affdvt. in opposition by pltff to motion to dismiss by First National Bank of Boston.
Sept. 25-74	Filed reply memo in support of motion of deft. H. J. Schalfly to dismiss complaint.
Sept. 26-74	Filed notice of reassignment to Judge MacMahon.

DOCKET ENTRIES

DATE

Sept. 25-74	Filed Stip & Order that reply papers on deft. Touche Ross's motion to dismiss the complaint be served by 10-7-74.
Oct. 1-74	Filed deft (Puckett & Richardsons') affdvt in opposition to plfft's class action motion.
Oct. 3-74	Filed pltff's affidavit in opposition to Defts Puckett & Richardson's motion to dismiss the complaint as to them.
Oct. 3-74	Filed Memo of Law of Pltff in opposition to motions by defts to dismiss.
Oct. 3-74	Filed pltff's response to defts interrogs.
Oct. 4-74	Filed deft (Touche Ross) reply affdvt. on motion to dismiss.
Oct. 4-74	Filed deft. (Touche Ross) reply memo in support of motion to dismiss the complaint.
Oct. 7-74	Filed deft (Touche) affdvt & notice of motion compelling pltff to respond to interrogs dated 8-24-74. Ret. 10-11-74



DOCKET ENTRIES

DATE

Oct. 7-74	Filed defts memo of law in support of motion to compel answers.
Oct. 9-74	Filed defts (Shafer & Wrather) affdvt in support of motion to dismiss the complaint.
Oct. 22-74	Filed Memo-Endorsed on motion of 8-20-74. Deft. First National Bank of Boston's motion to dismiss action on ground of improper venue is granted...So Ordered, MacMahon, J. m/n
Nov. 15-74	Filed Pltff's Notice of Appeal to USCA from an Order dated 10-21-74 dismissing this action against deft. First National Bank...Notice Mailed 11-19-74 to: Debevoise, Plimpton, Lyons & Gates of 299 Park Avenue, New York City.
Nov. 19-74	Filed Memo-End on back of motion filed 9-5-74... Motion withdrawn at pre-trial conference held on 10-4-74. So ordered-MacMahon, J.

DOCKET ENTRIES

DATE

Nov. 19-74	File Memo Endorsed on deft. Touche Ross & Co.'s filed 8-19-74. Motion withdrawn at pre-trial conference held on 10-4-74. So ordered --MacMahon, J.
Nov. 19-74	Filed Memo Endorsed on Pltff's motion filed 9-24-74. Motion withdrawn at pre-trial conference held on 10-4-74. So ordered, MacMahon, J.
Nov. 19-74	Filed Memo Endorsed on Deft's Puckett & Richardson, filed 9-23-74. Motion withdrawn at pre-trial conference held on 10-4-74. So ordered, MacMahon, J.
Nov. 19-74	Filed Memo Endorsed on Pltff's motion filed 7-25-74. Motion withdrawn at pre-trial conference held on 10-4-74. So ordered - MacMahon, J.
Nov. 19-74	Filed Memo Endorsed on Deft. Hubert J. Schlafly motion filed 9-12-74. Motion withdrawn at pre-trial conference held on 10-4-74. So ordered, MacMahon, J.



DOCKET ENTRIES

DATE

Nov. 19-74	Filed Memo Endorsed on Deft. Marvyn Carton motion filed 9-19-74. Motion withdrawn at pre-trial conference held on 10-4-74. So Ordered - MacMahon, J.
Nov. 19-74	Filed Memo Endorsed on Deft. Touche Ross & Co., motion filed 10-7-74. Motion withdrawn at pre-trial conference held on 10-4-74. So Ordered - MacMahon, J.
Nov. 19-74	Filed Order of Consolidation of 73 Civ 3929, 73 Civ 4109, 73 Civ 4133, 73 Civ 4895, 74 Civ 3025 (74 Civ 3281 for pre-trial purposes only) & 74 Civ 4341. See 73 Civ 3929 for entry of order. m/n
Dec. 16-74	Filed notice that original record on appeal has been certified and transmitted to the USCA.

2. Defendants have engaged, are now engaged, and are about to engage in acts and practices which constitute and will constitute violations of the Act, and will, unless restrained and enjoined, continue to engage in the acts and



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practices set forth in this complaint and acts and practices of similar purport and object.

3. The acts and practices constituting the violations alleged herein occurred within the Southern District of New York and elsewhere.

4. Teleprompter Corporation ("Teleprompter") is a New York corporation with corporate offices at 50 West 44th Street, New York, New York. At all times herein, Teleprompter was an issuer of common stock, registered pursuant to Section 12 of the Exchange Act, 15 U.S.C. 78j, and traded on the New York Stock Exchange.

5. Touche, Ross & Co. ("Touche") were the independent auditors for Teleprompter and certified its financial statements hereinafter alleged.

6. First National Bank of Boston ("Boston Bank") is a national banking institution which was related to the violations herein as hereinafter set forth.

7. The other defendants are or were officers and/or directors of Teleprompter, and involved in the said violations.

CLASS ACTION ALLEGATIONS

8. Plaintiff brings this action on behalf of a class herein described pursuant to Rule 23(b) (3) Fed. R.Civ.P.

9. The class consists of all persons who purchased

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common stock of Teleprompter Corp. during the period in which the violations complained of were committed. There are thousands of members of the class, located in various parts of the United States. Joinder of all members is impracticable. Plaintiff will fairly and adequately protect interests of the class. His claims are typical of claims of all class members. His interest is to obtain relief for himself and for class for the violations herein alleged.

10. A class action is superior to other available methods for fair and efficient adjudication of the controversy.

11. The violations alleged were perpetrated on the class. Each member has sustained damages too small to make it feasible to institute individual actions.

12. Multiple actions with burdens on the Courts and defendants and dangers to stockholders that the Statute of Limitations may run before they became aware of their rights, should be avoided.

13. It would be impracticable for all stockholders to intervene as parties in this action.

14. The Southern District of New York is the most convenient forum for litigating all claims herein alleged.

15. Plaintiff anticipates no difficulties in the management by this Court of the class action herein.

16. Questions of fact and law common to the class



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predominate over questions affecting only individual members.

17. The common questions of fact include the accuracy and materiality of the releases and reports of Teleprompter herein alleged and whether they were concealed from the public. Also whether data disseminated by Teleprompter to the public contained untrue statements of material facts and omitted to state material facts necessary to make the statements therein not misleading.

18. The common question of law includes whether the acts herein alleged violated the Act and whether the defendants are liable to the plaintiff and the class.

19. Since on or about January 1, 1973, defendant Teleprompter, directly and indirectly, by use of the means and instrumentalities of interstate commerce and of the mails has employed devices, schemes and artifices to defraud, has made untrue statements of material facts and has omitted to state material facts necessary to make the statements made, in light of the circumstances under which they were made, not misleading, and has engaged in acts, practices and courses of business in connection with the purchase and sale of securities, in violation of the Act.

20. On or about April 1, 1973, defendant Teleprompter filed with the SEC an annual report on Form 10-K including a consolidated balance sheet for the year ended December 31, 1972, distributed such report to its stockholders

COMPLAINT

and disseminated it among the investing public. Such reports states as assets plant, property and equipment at year-end December 31, 1972, valued at \$180,362,075, and the same at year-end December 31, 1971, were valued at \$113,885,737. Note 1 to the financial statements disclosed that. "The Corporation records additions to plant, property and equipment at cost which includes amounts for materials and applicable labor, overhead and interest." Note 5 disclosed that during years ended December 31, 1972 and 1971, respectively, interest aggregating approximately \$3.2 million and \$1.6 million had been capitalized as a cost of construction.

21. Said report is false and misleading in that it fails to state that capitalized overhead costs included in valuation of plant, property and equipment constituted approximately \$17 million, which fact was material in that Teleprompter reasonably should have known that a reduction in its construction program was likely and a substantial amount of such capitalized overhead costs would have to be charged against revenues, thus adversely affecting future earnings.

22. During 1973, Teleprompter made statements and issued releases and reports regarding anticipated growth of future earnings, its expanded program for construction of facilities, financial strength based upon a \$150 million revolving credit and term loan obtained as of approximately



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April 26, 1973, development of new programs, and possibility of external growth through acquisitions.

23. From and after on or about January 1, 1973, Teleprompter's management knew or reasonably should have known that its internal financial controls and procedures were inadequate to provide accurate and timely budgets, results of operations reports, and projections of costs and revenues for its new acquisitions and its existing systems.

24. On or prior to June 7, 1974, defendants were aware of potential business problems in that, among other things, the rate of Teleprompter's expenditures would deplete a \$150 million line of revolving and term credit obtained as of April 26, 1973 by the first quarter of 1974, whereas it was intended that such credit be sufficient for financing construction programs through December 31, 1974; that Teleprompter had then and in the future would have cash flow problems; that without sufficient funds construction would halt; that the halt in such construction activity, under Teleprompter's then current accounting policies, would adversely affect Teleprompter's earnings; that Teleprompter would be "unprofitable" and might realize a net loss in 1973; and construction should be slowed to preserve available funds. Teleprompter's management was advised shortly thereafter that earnings for the second quarter of 1973 would not be as high as those for the first quarter of 1973.

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25. Notwithstanding management's awareness of such problems, and notwithstanding that such problems were under consideration, on or about July 12, 1973, Teleprompter issued a press release which announced that as a result of an accelerated expansion program second quarter earnings per share were expected to be lower than those of first quarter of 1973, that the company was in the midst of its building years, and that the company planned to take down the remainder of a \$150 million bank credit line in 1973 and 1974 to finance its construction and expansion program. Such release was false and misleading in that at such time, Teleprompter knew or reasonably should have known that a reduction in its construction program was likely and that substantial amounts of capitalized overhead costs would have to be charged against revenues, thus adversely affecting future earnings, and Teleprompter was experiencing other financial problems.

26. On or about August 6, 1973, Teleprompter issued a press release which re-confirmed that statement in the July 12, 1973 press release that Teleprompter was in the midst of its building years and stated that Teleprompter was now charging a lower percentage of certain expenditures to capital and deferred accounts than theretofore and charging a greater percentage of such items to expenses for the first six months ended June 30, 1973 than was charged in the first quarter of 1973, and, as a result earnings were 6 cents per common and common



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equivalent share in the second quarter of 1973 as compared with 22 cents per common and common equivalent share in the first quarter of 1973. Such release was false and misleading in that, at such time, Teleprompter knew or reasonably should have known that a reduction in its construction program was likely and that substantial amounts of capitalized overhead costs would be charged against revenues, adversely affecting future earnings, and Teleprompter was experiencing other financial problems.

27. On a number of occasions between June 7, 1973 and September 4, 1973, officers and directors of Teleprompter received information, engaged in discussions and meetings and made decisions relating to necessity of conserving cash and curtailing Teleprompter's construction program, and relating to the impact that such actions would have upon Teleprompter's financial condition and earnings.

28. At a meeting of the Board of Directors of Teleprompter on or about August 13, 1973, the Board was informed that Teleprompter's operations were at a cash-even basis and as a result, Teleprompter's construction of cable television franchises was being financed by funds obtained under the \$150 million bank credit. It has been anticipated that Teleprompter would have a positive cash flow. The Board, at such meeting, approved a program designed to attain the budgeted revenue projection for 1973 by increasing the number of subscribers to cable television systems and reducing construction costs by curtailing construction

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and reviewing the entire construction program to ascertain for which systems construction could be deferred until 1974.

29. On or about August 24, 1973, Todd met with a vice president of the First National Bank of Boston, Teleprompter's agent bank in a \$150 million Revolving and Term Credit Agreement dated as of April 26, 1973, at which time cash flow figures, proposed curtailment of the construction program and earnings were discussed.

30. By letter of August 28, 1973 the Bank vice president communicated with Todd in which he noted that the foundation of the loans was predicated on the cash flow of Teleprompter, and suggested that as a result of the marked difference in cash flow between figures shown him on August 24, 1973, and those originally provided the bank, Teleprompter had a cash flow problem immediately. The Bank's vice president acknowledged certain steps he understood Teleprompter seriously considered implementing as follows: (a) cutting back construction expenditures wherever possible and practical; (b) reducing overhead expenditures; and (c) considering possibility of disposing of assets of subsidiaries which are unprofitable cash users.

31. On or about August 30, 1973, the Bank vice president requested that directors of Teleprompter be polled to determine whether the program, as outlined in the aforementioned letter of August 28, 1973, and as submitted by Todd to the Bank, was authorized by Teleprompter Board



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of Directors. The proposals contained in the August 28, 1973 letter were unanimously approved by Teleprompter's board of directors as indicated in a letter from the Secretary of Teleprompter confirming such vote by the Teleprompter's board of directors.

32. On or about August 24, 1973, Teleprompter requested from the Bank an advance of \$12 million under the Revolving and Term Credit Agreement but delivery of funds was deferred until all of the banks party to the agreement had been informed of the then condition of Teleprompter, of its program to curtail construction and improve its financial condition, and of a possible default by Teleprompter under the lending agreement.

33. On or about September 4, 1973, Teleprompter issued a press release "concerning rumors circulating about adverse corporate developments" in which the company stated:

"We categorically deny that there are any unannounced adverse developments concerning Teleprompter's business, assets, or earnings.

"Teleprompter is in the midst of the largest construction program in its history. Record high interest costs and a lower rate of gaining new subscribers in relation to the growing number of homes behind cable have led management to temporarily suspend about 20 percent of its 1973 construction program and to review the entire construction program.

"Teleprompter's current priority is to add new subscribers to existing cable systems where construction during the past year outpaced subscriber additions."

COMPLAINT

34. Such press release issued on September 4, 1973, was materially false and misleading in that it failed to disclose that Teleprompter was experiencing cash flow problems, that a request for a drawdown of funds under the \$150 million agreement had been deferred at the request of the Bank, the impact or estimate of the effect the curtailment in construction would have on future income and earnings, probability that investments in certain cable systems would be written down due to curtailment of construction, and that increased expenses would be incurred from a new marketing program to obtain new subscribers.

35. Each of the defendants as hereinbefore described, aided and abetted Teleprompter and the other defendants and/or joined and participated in the one continuous course of conduct and plan and scheme to eliminate knowledge of the problems of Teleprompter from the investing public. Each of the defendants actively participated in the violations hereinbefore alleged and adopted by action and by inaction the violations committed by each of the defendants hereto.

36. Defendant, Touche, as independent auditors for Teleprompter, wantonly disregarded its obligation to the public to expeditiously bring to the attention of the SEC and the New York Stock Exchange and the public, the fact that the financial condition and cash available and



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working capital and cash flow of Teleprompter were such that the financial statements issued by Teleprompter were misleading and omitted material disclosures. With knowledge of such falsity of Teleprompter's financial statements, Touche nevertheless approved such statements, gave the reputation of its name and authority to Teleprompter and to such financial statements, thus causing the public to be misled and resulting in the loss to plaintiff.

37. Defendant, Boston Bank, as afore-described, knew full well of the violations afore-described and failed to bring them to the attention of the SEC and the New York Stock Exchange, and to inform the public thereof, despite the fact that in performing its function on behalf of and together with Teleprompter, Boston Bank entered into fiduciary obligations to the investing public and particularly to the stockholders of Teleprompter and to the plaintiff.

38. Plaintiff and the members of the class and the investing public were ignorant of the fact that the press releases, financial statements and other reports issued by Teleprompter as afore described, were materially false and misleading in the respects so described. Plaintiff and said other persons traded in the securities of Teleprompter in reliance upon the accuracy, completeness and forthrightness of the statements so distributed by the defendants and were damaged by the said conduct in an amount presumably unknown to the plaintiff.

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39. As a result of the actions aforescribed, defendants have committed a common-law fraud upon the plaintiff and members of the class and have likewise violated the statutes of the State of New York respecting said activities.

40. Said activities of the defendants were committed in a wanton and malicious manner and constituted fraud upon the public generally, and a violation of the business ethics required of such defendants.

WHEREFORE, Plaintiff demands judgment:

1. Determining that this action be maintained as a class action.
2. Determining that plaintiff and the members of the class have judgment against defendants and each of them in amount sufficient to compensate for the damages incurred, with proper interest thereon.
3. Enjoining defendants and any other person acting in active concert or participation with them, in connection with the purchase and sale of Teleprompter securities and any other security, from further acts and practices in violation of Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated by the SEC thereunder.
4. Granting to plaintiff and members of the class



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punitive and exemplary damages in the sum of \$1 Million.

5. Granting to plaintiff the costs and expenses of this action, including reasonable attorneys and accountants fees.

6. Granting such other and further relief as this Court may deem appropriate.

IRA JAY SANDS

By:

(Sgd.) Ira Sands  
Attorney for Plaintiff  
Office and Post Office Address  
701 Seventh Avenue  
New York, New York 10036  
(212) 265-3500

AND

SAMUEL GOTTLIEB  
GAINSBURG, GOTTLIEB, LEVITAN & COLE  
Co-Counsel for Plaintiff  
122 East 42nd Street  
New York, New York 10017  
(212) 697-3440

NOTICE OF MOTION OF  
FIRST NATIONAL BANK OF  
BOSTON TO DISMISS

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

-----X

HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., et al.,

Defendants.

:

:

:

:

:

74 Civ 3025 (JMC)

NOTICE OF MOTION OF THE  
FIRST NATIONAL BANK OF  
BOSTON TO DISMISS

-----X

S I R S:

PLEASE TAKE NOTICE that, upon the annexed affidavit of Phillip A. Shaver, sworn to August 9, 1974, and the Exhibits thereto, and upon all of the papers heretofore filed, the undersigned will move before Hon. John M. Cannella, a Judge of this Court, at the United States Courthouse, Foley Square, Borough of Manhattan, City and State of New York, on the 29th day of August, 1974, for an order, pursuant to Rules 12(b)(2) and (3) of the Federal Rules of Civil Procedure, dismissing the above-entitled action as against defendant the First National Bank of Boston on the ground that, pursuant to Section 94 of the National Bank Act (12 U.S.C. Sec. 94), venue of this action as to the First National Bank of Boston is improper in the Southern District of New York.



NOTICE OF MOTION OF  
FIRST NATIONAL BANK OF  
BOSTON TO DISMISS

Dated: New York, New York  
August 19, 1974

Yours, etc.,

DEBEVOISE, PLIMPTON, LYONS & GATES

By (Sgd) Robert L. King  
A Member of the Firm  
Attorneys for Defendant The  
First National Bank of Boston  
299 Park Avenue  
New York, New York 10017  
(212) 752-6400

TO:

IRA JAY SANDS, ESQ.  
Attorney for Plaintiff  
701 Seventh Avenue  
New York, New York 10036

SAMUEL GOTTLIEB, ESQ.  
GAINSBURG, GOTTLIEB, LEVITAN & COLE  
Co-Counsel for Plaintiff  
122 East 42nd Street  
New York, New York 10017

SHEA GOULD CLIMENKO & KRAMER  
Attorneys for Defendant  
Teleprompter Corporation  
330 Madison Avenue  
New York, New York 10017

ROSENMAN, COLIN, KAYE, PETSCHKE, FREUND & EMIL  
Attorneys for Defendant Touche, Ross & Co.  
575 Madison Avenue  
New York, New York 10022

AFFIDAVIT OF PHILIP A.  
SHAVER IN SUPPORT OF  
MOTION TO DISMISS

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- x

HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., TELEPROMPTER  
CORPORATION, JACK K. COOKE, RAYMOND  
P. SHAFER, W.J. BRESNAN, H.J.  
SCHLAFLY, LEONARD TOW, R.C. TODD,  
JR., B.P. SIMON, J.B. GREEN, L.H.  
READ, R.G. WILSON, H.E. FLAHERTY,  
B.D. FISCHMAN, BERLE ADAMS, MARVIN  
CARTON, R.F. LEWIS, P. L. LOWE,  
CHARLES LUCKMAN, M.B. MITCHELL,  
A.E. PUCKETT, J.H. RICHARDSON,  
M.E. LIVINGSTON, JACK WRATHER,  
FIRST NATIONAL BANK OF BOSTON,

Defendants.

-----x

AFFIDAVIT OF PHILIP  
A. SHAVER IN SUPPORT  
OF MOTION TO DISMISS

STATE OF MASSACHUSETTS )  
: ss.:  
COUNTY OF SUFFOLK )

PHILIP A. SHAVER, being first duly sworn, deposes and  
says:

1. I am Assistant Vice President, Associate Counsel and  
Secretary pro tempore of the Board of Directors of the  
First National Bank of Boston ("Bank"), and I make this  
affidavit in support of the motion of the Bank pursuant to  
Title 12, U.S.C.A. 94, to dismiss the action as to the Bank  
for lack of proper venue.



AFFIDAVIT OF PHILIP  
A. SHAVER IN SUPPORT  
OF MOTION TO DISMISS

2. The Bank is a national banking association incorporated under the banking laws of the United States (Title 12, U.S.C.A.), with its only place of business for conducting banking business located in the City of Boston, State of Massachusetts.

3. The Bank maintains no office, facility, or place of business of any kind in the Southern District of New York or in the State of New York, has no office or agent in either of them, except that solely in connection with its qualification pursuant to Section 131(3) of the Banking Law of New York to act in a fiduciary capacity in the surrogate's courts of the state and in other fiduciary capacities in the state, the Bank filed an instrument on January 15, 1971 appointing the Superintendent of Banks of the State of New York as its attorney upon whom all process could be served, in any action affecting or relating to an estate, trust or fund held or represented by it.

4. The Bank is a federally chartered National Banking Association, at the located specified in its charter, to wit, in the City of Boston, County of Suffolk, State of Massachusetts. True copies of the Articles of Incorporation and the Certificate of the Comptroller of the Currency are attached hereto as Exhibits A and B, respectively, and are made a part hereof.

AFFIDAVIT OF PHILIP  
A. SHAVER IN SUPPORT  
OF MOTION TO DISMISS

5. On the basis of the foregoing, I respectfully urge that the Motion of the Bank to dismiss the complaint as to it be granted.

6. The submission of this Affidavit shall not be construed as any waiver of the Bank's objection to its being sued in the United States District Court for the Southern District of New York on the grounds that under Section 12 of the National Bank Act venue in that District is improper.

(Sgd) Philip A. Shaver  
Philip A. Shaver

Subscribed and sworn to this ninth  
day of August, 1974.

(Sgd) Trudy Lee Wood  
Notary Public in and for the  
County of Suffolk, State of  
Massachusetts

My commission Expires April 24, 1981



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EXHIBIT ANNEXED TO AFFIDAVIT OF PHILIP A. SHAVER



*The* FIRST NATIONAL BANK *of* BOSTON

Boston, Massachusetts

---

*Certified Copy*  
*of the*  
*Articles of Association*

HH-874  
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EXHIBIT "A"

EXHIBIT ANNEXED TO AFFIDAVIT OF PHILIP A. SHAVER



*The* FIRST NATIONAL BANK *of* BOSTON

*Certified Copy  
of the  
Articles of Association*

I, the undersigned, T. McLean Griffin, *DO HEREBY CERTIFY* that:

1. I am the Cashier and Secretary of the Board of Directors of THE FIRST NATIONAL BANK OF BOSTON (hereinafter called the "*Bank*") and in that capacity have custody of its corporate records and have authority to certify to such records.

2. Set forth below is a complete and correct copy of the Articles of Association of the Bank as they are in effect on the date of this certificate:

Charter No. 200

ARTICLES OF ASSOCIATION

FIRST. The title of this Association shall be "The First National Bank of Boston".

SECOND. The Head Office of this Association shall be in the City of Boston, in the County of Suffolk and Commonwealth of Massachusetts. The general business of this Association shall be conducted at its Head Office and at its legally established branches.

THIRD. The Board of Directors of this Association shall consist of such number of shareholders, not less than five nor more than twenty-five, as shall be determined from time to time by resolution of a majority of the votes to which



EXHIBIT ANNEXED TO AFFIDAVIT OF PHILIP A. SHAVER

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all of the shareholders are at the time entitled to cast at any annual or special meeting of the shareholders. Unless otherwise provided by the laws of the United States, any vacancy in the Board of Directors for any reason, including an increase in the number thereof, may be filled by action of the Directors remaining.

FOURTH. The regular annual meeting of the shareholders of this Association for the election of directors and the transaction of whatever other business may be properly brought before said meeting shall be held at the Head Office, or such other convenient place as the Board of Directors may designate, on the day of each year specified therefor in the By-Laws of this Association, but if no election is held on that day it may be held on any subsequent day in accordance with the provisions of the laws of the United States. All elections shall be held in accordance with such lawful regulations as may be prescribed by the Board of Directors.

FIFTH. The authorized amount of Capital Stock of this Association shall be \$90,000,000, divided into 7,200,000 shares of the par value of \$12.50 each; but said Capital Stock may be increased or decreased from time to time in accordance with the provisions of the laws of the United States.

If the Capital Stock of this Association is increased by the sale of additional shares thereof for cash only, each shareholder shall be entitled to subscribe for such additional shares in proportion to the number of shares of the Capital Stock owned by him at the time the increase is authorized by the shareholders, unless another time subsequent to the date of the shareholders' meeting is specified in a resolution adopted by the shareholders at the time the increase is authorized. The Board of Directors shall have the power to prescribe a reasonable period of time within which the pre-emptive rights to subscribe to the new shares of Capital Stock must be exercised.

This Association, at any time and from time to time, may authorize and issue debt obligations, whether or not subordinated, and whether or not convertible into shares of the Capital Stock, without the approval of the shareholders. If debt obligations are issued by this Association which are convertible into shares of the Capital Stock, no holder of Capital Stock shall have, as such, any pre-emptive or preferential rights to subscribe for, purchase or receive debt obligations or any shares of the Capital Stock which may be issued upon the conversion of any such debt obligations. The Board of Directors, in its discretion, may determine the terms and conditions of such obligations and the method and terms of issue and sale thereof.

SIXTH. The Board of Directors (a majority of which shall be a quorum to transact business) shall appoint one of its members to be President of this Association who shall hold office (unless he shall become disqualified or be sooner removed

EXHIBIT ANNEXED TO AFFIDAVIT OF PHILIP A. SHAVER

## 3

by a two-thirds vote of the members of the Board) for the term for which he was elected a director. The Board of Directors may appoint one of its members to be Chairman of the Board, who shall perform such duties as may be designated by it. The Board of Directors shall have power to appoint one or more Vice Presidents, and to appoint a Cashier and such other officers and employees as may be required to transact the business of this Association.

The Board of Directors shall have the power to define the duties of the officers and employees of this Association; to fix the salaries to be paid to them; to dismiss them; to require bonds from them and to fix the penalty thereof; to regulate the manner in which any increase of the capital of this Association shall be made to manage and administer the business affairs of this Association; to make all By-Laws that it may be lawful for them to make; and generally to do and perform all acts that it may be legal for a board of directors to do and perform.

SEVENTH. The Board of Directors shall have the power to change the location of the Head Office of this Association to any other place within the limits of the City of Boston, Massachusetts, without the approval of the shareholders but subject to the approval of the Comptroller of the Currency, and shall have the power to establish or change the location of any branch or branches of this Association without the approval of the shareholders but subject to such limitations as from time to time may be provided by law.

EIGHTH. The corporate existence of this Association shall continue until terminated in accordance with the laws of the United States.

NINTH. The Board of Directors, or the holders of not less than one-tenth of the outstanding Capital Stock of this Association, may call a special meeting of shareholders at any time; *provided, however*, that unless otherwise provided by law, not less than ten days prior to the date fixed for any such meeting, a notice of the time, place and purpose of the meeting shall be given by first-class mail, postage prepaid, to each shareholder of record at his address as shown upon the books of this Association.

TENTH. Any person, his heirs, executors or administrators, may be indemnified or reimbursed by this Association for reasonable expenses actually incurred in connection with any action, suit or proceeding, civil or criminal, to which he or they shall be made a party by reason of his being or having been a director, officer or employee of this Association or of any firm, corporation or organization which he served in any such capacity at the request of this Association; *provided, however*, that no person shall be so indemnified or reimbursed in relation to any matter in such action, suit or proceeding as to which he shall finally be adjudged to have been guilty of or liable for gross negligence, willful misconduct or criminal acts in the performance of his duties to this Association; and *provided, further*, that



EXHIBIT ANNEXED TO AFFIDAVIT OF PHILIP A. SHAVER

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no person shall be so indemnified or reimbursed in relation to any matter in such action, suit or proceeding which has been made the subject of a compromise settlement except with the approval of a court of competent jurisdiction, or the holders of record of a majority of the outstanding shares of this Association, or the Board of Directors, acting by vote of directors not parties to the same or substantially the same action, suit or proceeding, constituting a majority of the whole number of the directors. The foregoing right of indemnification or reimbursement shall not be exclusive of other rights to which such person, his heirs, executors or administrators may be entitled as a matter of law.

This Association may, upon the affirmative vote of a majority of its Board of Directors, purchase insurance for the purpose of indemnifying its directors, officers and other employees to the extent that such indemnification is allowed in the preceding paragraph. Such insurance may, but need not, be for the benefit of all directors, officers or employees.

ELEVENTH. These Articles of Association may be amended at any regular or special meeting of the shareholders by the affirmative vote of the holders of a majority of the outstanding shares of Capital Stock of this Association, unless the vote of the holders of a greater amount of such Capital Stock is required by law, and in that case, by the vote of the holders of such greater amount thereof.

IN WITNESS WHEREOF, we have hereunto set our hands this 10th day of September, 1970.

ROGER C. DAMON  
ROGER C. DAMON

RICHARD D. HILL  
RICHARD D. HILL

WILLIAM L. BROWN  
WILLIAM L. BROWN

J. WARREN OLMSTED  
J. WARREN OLMSTED

GEORGE E. PHALEN  
GEORGE E. PHALEN

IN WITNESS WHEREOF, I have hereunto set my hand and affixed hereto the seal of THE FIRST NATIONAL BANK OF BOSTON this 13th day of August, 1974

*T. M. Giff*  
.....  
Cashier and Secretary of the  
Board of Directors

EXHIBIT "A"

EXHIBIT ANNEXED TO AFFIDAVIT OF PHILIP A. SHAVER

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COMMONWEALTH OF MASSACHUSETTS }  
 SUFFOLK COUNTY ..... } ss.

On the 13<sup>th</sup> day of August, 1974, before me, the undersigned Notary Public in and for said Commonwealth duly commissioned and sworn, personally came T. McLEAN GRIFFIN, to me known, who, being by me duly sworn, did depose and say that he resides at No. 14 Beckford Street, Salem, Massachusetts; that he is the Cashier and Secretary of the Board of Directors of THE FIRST NATIONAL BANK OF BOSTON, a national banking association organized and existing under the laws of the United States of America; that he executed the foregoing certificate in his capacity aforesaid as his free act and deed and that the seal affixed thereto is the seal of said Bank, and that he was duly authorized by the Board of Directors of said Bank to execute said certificate and to affix the seal of said Bank thereto.

.....  
 Notary Public  
 Trudy Lee Wood  
 NOTARY PUBLIC  
 My commission expires April 24, 1981

EXHIBIT "A"



EXHIBIT ANNEXED TO AFFIDAVIT OF PHILIP A. SHAVER  
CERTIFICATE

TREASURY DEPARTMENT  
 Office of  
 Controller of the Currency

)  
 )  
 ) ss:

J. T. Watson, Deputy Comptroller of the Currency, do hereby certify

Pursuant to Revised Statutes 324, et seq., as amended, 12 U.S.C. 1, et seq., the Comptroller of the Currency charters and exercises regulatory and supervisory authority over all national banking associations;

2. On January 16, 1864, Safety Fund Bank of Boston, Boston, Massachusetts, was chartered as a National Banking Association under the laws of the United States and under the title of "The First National Bank of Boston";

3. The document hereto attached is a true and complete copy of the Charter Certificate issued to The First National Bank of Boston, Massachusetts, the original of which certificate was issued by the office on January 16, 1864;

4. Effective as of the opening of business January 4, 1871, this bank merged into The Massachusetts Bank, National Association, Boston, Massachusetts, under the title of "The First National Bank of Boston"; and

5. The First National Bank of Boston, Boston, Massachusetts, continues to hold valid certificate to do business as a National Banking Association

IN TESTIMONY WHEREOF, I have hereunto  
 subscribed my name and caused the seal  
 of Office of the Comptroller of the  
 Currency to be affixed to these presents  
 at the Treasury Department, in the City  
 of Washington and District of Columbia,  
 this 17th day of February, A. D. 1972.

*J. T. Watson*  
 Deputy Comptroller of the Currency

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EXHIBIT ANNEXED TO AFFIDAVIT OF PHILIP A. SHAVER

TREASURY DEPARTMENT,

Office of Comptroller of the Currency,

Washington Jan. 16 1864.

Whereas, by satisfactory evidence presented to the undersigned, it has been made to appear that the First National Bank of Dorchester in the County of Suffolk and State of Massachusetts has been duly organized under, and according to the requirements of the act of Congress, entitled "An act to provide a national currency, secured by a pledge of United States stocks, and to provide for the circulation and redemption thereof, approved February 25, 1863, and has complied with all the provisions of said act required to be complied with before commencing the business of Banking:

Now, therefore, I, Hugh M. Culloch Comptroller of the Currency, do hereby certify that the said First National Bank of Dorchester County of Suffolk and State of Massachusetts is authorized to commence the business of Banking under the act aforesaid.

In Testimony Whereof, witness my hand and seal of office, this 16th day of January 1864.

Hugh M. Culloch

Comptroller of the Currency.

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EXHIBIT "B"



AFFIDAVIT IN OPPOSITION  
TO MOTION OF FIRST  
NATIONAL BANK OF BOSTON  
\_\_\_\_\_ TO DISMISS

Their motion is based upon the illusion that despite their affirmative designation of the Superintendent of Banks of New York as an agent for service of process upon them, they can escape being sued in this state because of their reliance upon Section 94 of the National Bank Act. However, they are inaccurate as it affects the First National Bank of Boston.

AFFIDAVIT IN OPPOSITION  
TO MOTION OF FIRST  
NATIONAL BANK OF BOSTON  
TO DISMISS

Under normal circumstances, of course, Section 94 of the National Bank Act would prevent a bank foreign to this judicial district from being sued in this judicial district. However, plaintiff has obtained a copy of a letter dated January 15, 1971 to "Legal Division, State of New York Banking Department" from First National Bank of Boston over the signature of its Vice President (with copy to the Superintendent of Banks of the State of New York) enclosing for filing various instruments "designating the Superintendent Of Banks of the State of New York or his successor, as agent for service of process".

The designation form itself states:

"This Bank desires to transact business in the State of New York...". The First National Bank of Boston hereby constitutes and appoints the Superintendent of Banks, State of New York, and his successors in such office, to be the true and lawful attorney of this Bank, in and for the State of New York, upon whom all lawful process in any action or proceeding against this Bank in New York may be served in like manner and with the same effect as if this Bank existed therein."

Attached hereto as Exhibit "A" is a copy of the letter of January 15, 1971 from the Bank to the Legal Division, New York Banking Department. Attached hereto as Exhibit "B" is a copy of a designation of the Bank



AFFIDAVIT IN OPPOSITION  
TO MOTION OF FIRST  
NATIONAL BANK OF BOSTON  
TO DISMISS

which was acknowledged by the Official Cashier of the Bank on January 15, 1971.

It is respectfully urged that since this particular Bank has sought the privilege under the laws of the State of New York to conduct business within the State of New York and has voluntarily filed certificates designating an officer of the State of New York as agent for the service of process in the State of New York, this Bank cannot now be heard to say that such official act of consent was really meaningless and of no force or effect, but rather an empty gesture in 1971.

The attached Memorandum of Law submitted by plaintiff sets forth statutory support for the position taken by plaintiff. Therefore, the motion by the Defendant Bank should be denied.

(Sgd) Ira Sands  
IRA JAY SANDS

Sworn to before me

this 18th day of September, 1974.

(Sgd) Raymond Burrasca  
Notary Public, State of New York

My commission expires March 30, 1976

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

January 15, 1971

Legal Division  
State of New York  
Banking Department  
100 Church Street  
New York, New York

Gentlemen:

Pursuant to the enclosed copies of a letter dated December 9, 1970 which we received from Peter J. Sparano, Administrative Officer, we are enclosing herewith for filing, as required by Section 131(3) of the New York Banking Law, the following instruments on behalf of The First National Bank of Boston:

1. A Power of Attorney executed by The First National Bank of Boston under date of January 15, 1971, designating the Superintendent of Banks of the State of New York or his successor, as agent for service of process, and further designating T. McLean Griffin, Cashier, and his successors in office, as being the appropriate officer to whom process shall be forwarded.
2. A certified copy of the Articles of Association of The First National Bank of Boston.
3. An affidavit signed by the Bank's counsel, Edward M. Coudit, Jr., Esquire, certifying that reciprocity exists between Massachusetts and New York.
4. Certificates of the Comptroller of the Currency with respect to the merger of the Bank and Old Colony Trust Company and with respect to the interim conversion of Old Colony Trust Company into a national bank.

EXHIBIT "A"



EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

State of New York  
Banking Department

-2-

January 15, 1971

We note that as the result of a merger on January 4, 1971, The First National Bank of Boston continues the heretofore existing fiduciary appointments of Old Colony Trust Company, a Massachusetts corporation, and is entitled to further appointments under instruments in which Old Colony Trust Company is named, as well as appointments in the name of The First National Bank of Boston.

We also note that favorable reciprocity for foreign banks acting as fiduciaries in Massachusetts continues in effect under Massachusetts General Laws, Chapter 167, Section 45A, a copy of which is enclosed.

Please advise us if you require anything further in connection with our continued qualification under Section 131.

Very truly yours,

THE FIRST NATIONAL BANK OF BOSTON

By \_\_\_\_\_  
Vice President, Old Colony Trust  
Division

Enclosures

Copies to:

Mr. William T. Pantzer, Jr.  
Superintendent of Banks  
State of New York State House  
Albany, New York

Mr. T. McLean Griffin, Cashier  
The First National Bank of Boston

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

KNOW ALL MEN BY THESE PRESENTS that I, T. McLEAN GRIFFIN as Cashier of The First National Bank of Boston, a national banking association located in the City of Boston, County of Suffolk, Commonwealth of Massachusetts, and organized under the laws of the United States of America. This Bank desires to transact business in the State of New York in conformity with Section 131(3) of the New York State Banking Law. The First National Bank of Boston hereby constitutes and appoints the Superintendent of Banks, State of New York, and his successors in such office, to be the true and lawful attorney of this Bank in and for the State of New York, upon whom all lawful processes in any action or proceeding against this Bank in New York may be served in like manner and with the same effect as if this Bank existed therein.

THE FIRST NATIONAL BANK OF BOSTON hereby designates the undersigned, T. McLEAN GRIFFIN, Cashier, and his successors in office, to be the appropriate officer of the Bank to whom process shall be forwarded by the Superintendent of Banks

*T. McLean Griffin*  
T. McLEAN GRIFFIN, Cashier

COMMONWEALTH OF MASSACHUSETTS  
COUNTY OF SUFFOLK

The above T. McLEAN GRIFFIN personally appeared before me and acknowledged this statement to be his free act and deed, before me, this 15<sup>th</sup> day of January, 1971.

*George H. [Signature]*  
Notary Public



ADDITIONAL AFFIDAVIT IN  
OPPOSITION BY PLAINTIFF TO  
MOTION OF DEFENDANT THE  
FIRST NATIONAL BANK OF BOS-  
TON TO DISMISS THE COMPLAINT  
AS TO IT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

----- \*

HYMAN RADZANOWER, : 74 Civ. 3025 (JMC)

Plaintiff, :

-against-

TOUCHE, ROSS & CO., et al., :

Defendants. :

ADDITIONAL AFFIDAVIT IN  
OPPOSITION BY PLAINTIFF TO  
MOTION OF DEFENDANT THE  
FIRST NATIONAL BANK OF BOS-  
TON TO DISMISS THE COMPLAINT  
AS TO IT

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STATE OF NEW YORK )  
 : SS.:  
COUNTY OF NEW YORK )

IRA JAY SANDS, being duly sworn, deposes and says:

The Reply Memorandum of this Defendant wrongly claims that its qualification to do Banking business in New York, designated the Superintendent of Banks of the State of New York, in a "limited capacity only.

Plaintiff respectfully submits that the defendant is inaccurate on the state of the law, is inaccurate in its citations, and is inaccurate on the facts of its own designation of the Superintendent of Banks.

First, the written designation by this defendant of the Superintendent of Banks as its agent for service of process, was not limited in any manner. On the contrary, it is widespread and unlimited with respect to

ADDITIONAL AFFIDAVIT IN  
OPPOSITION BY PLAINTIFF TO  
MOTION OF DEFENDANT THE  
FIRST NATIONAL BANK OF BOS-  
TON TO DISMISS THE COMPLAINT  
AS TO IT

matters which occur within the State of New York.

This defendant Bank failed to do what the Chase National Bank did in Buffum v. Chase National Bank, 192 F.2d 58, 61 (2nd Cir. 1951), where the Chase Bank first had originally designated in Illinois, that its agent would accept service "in all suits in Illinois", but later, replaced that designation with another resolution limiting the service to specific matters.

Our defendant Bank has designated its New York agent broadside, without limitation, as Chase originally had done in Illinois before it corrected itself.

In fact, the Buffum case, cited so strongly by our defendant in its support, is directly against our defendant. In Buffum, the Court emphasized that the consent to be sued which had been executed by Chase National Bank was "limited" in its language, for it said (p. 59):

"In connection with the acceptance and execution of trusts and receipts of deposits and trust funds in Illinois."

Our defendant cannot show any language in its designation which limits the scope, as Buffum did in writing.

On page 60, the decision again referred to the fact that the Chase Bank had not consented to be sued in



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ADDITIONAL AFFIDAVIT IN  
OPPOSITION BY PLAINTIFF TO  
FIRST NATIONAL BANK OF BOS-  
TON TO DISMISS THE COMPLAINT  
AS TO IT

Illinois except "in connection with the acceptance and execution of trusts and receipts of deposits of trust funds in Illinois." The Court further stated that these matters were not involved in the action.

The logic is that the Court would have not gone so far out of its way so many times to explain that the subject of the action was not within the precise limiting language of the Chase Bank's written designation.

The Buffum Court emphasized that the shield of Section 94 can be waived by a Bank, by deed or by word.

On page 61, the Buffum Court discussed in detail the type of action involved, and concluded that the specific limitation by the Chase Bank of its waiver did not include the contract business which was the subject of the litigation.

From the specific logic of the Buffum case, it is clear that this Court can precisely hold that since the First National Bank of Boston designated the Superintendent of Banks without limitation, to accept service in actions resulting from New York transactions, the bank intentionally waived and did not preserve to itself protection against any specific type of litigation.

ADDITIONAL AFFIDAVIT IN  
OPPOSITION BY PLAINTIFF TO  
FIRST NATIONAL BANK OF BOS-  
TON TO DISMISS THE COMPLAINT  
AS TO IT

The defendant also cites Tuthill v. George May International, 55 Misc. 2d 542, 285 N.Y.S. 2d. 317 (Sup. Ct. Suffolk 1967); but Tuthill is not in point. There, the plaintiff was suing his employer in connection with the employer's profit-sharing trust which had funds deposited in the Continental Illinois Bank in Chicago. It was admitted that the trust was established and administered in Chicago, and all funds for the trust were there deposited with no funds deposited in New York. The transaction therefore did not take place in New York. Whether or not Continental Illinois had designated the Superintendent of Banks to accept process with respect to transactions that took place in New York, did not apply to that situation.

With respect to the letter from our defendant First National Bank of Boston, to the New York State Superintendent of Banks, this was not supplied to the Court by the defendants, and was only furnished to plaintiff's counsel after we had ascertained the probable existence of such a designation by the defendant, and only after our request that such designation be produced.

Of course we are not suggesting that the defendants were withholding evidence or misleading the Court and the language was certainly not chosen with any intent other than to present for the Court's examination the designation



ADDITIONAL AFFIDAVIT IN  
OPPOSITION BY PLAINTIFF TO  
FIRST NATIONAL BANK OF BOS-  
TON TO DISMISS THE COMPLAINT  
AS TO IT

of the Superintendent of Banks, which had been voluntarily filed by this defendant for its own benefit.

The fact that the Bank may maintain no active facility or place of business in New York does not water down its clear unqualified designation of the Superintendent of Banks as agent for process. Despite its claim on page 4 of its memorandum that the designation of the Superintendent of Banks was for the purpose of service "in any action affecting or relating to an estate, trust or fund, held or represented by it" no such language or similar language appears in the broad scale designation.

Neither does Section 131 (3) of the New York State Banking Law limit the broadscale designation which this Bank filed.

Furthermore, defendant Bank is inaccurate on page 4 of its memorandum in stating that we suggest that service would be proper for any matter "arising out of its general banking business conducted in Boston."

We did not so state! Plaintiff's position is that the designation by this defendant Bank, covers suits arising out of its business conducted in New York.

ADDITIONAL AFFIDAVIT IN  
OPPOSITION BY PLAINTIFF TO  
FIRST NATIONAL BANK OF BOS-  
TON TO DISMISS THE COMPLAINT  
AS TO IT

WHEREFORE, it is respectfully urged that the  
broadscale waiver by the Bank, and written designation  
of the Superintendent of Banks, voluntarily filed by  
the First National Bank of Boston, mandates that its  
motion be denied.

(Sgd) Ira Jay Sands  
IRA JAY SANDS

Sworn to before me this  
day of September, 1974

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EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

SEE IDENTICAL EXHIBIT "A" ANNEXED TO AFFIDAVIT  
OF IRA JAY SANDS DATED SEPT. 18, 1974,  
PGS. A-45 - A-46 OF THIS APPENDIX

EXHIBIT "A"

EXHIBIT ANNEXED TO AFFIDAVIT OF IRA JAY SANDS

SEE IDENTICAL EXHIBIT "B" ANNEXED TO AFFIDAVIT  
OF IRA JAY SANDS DATED SEPT. 18, 1974,  
PG. A-47 OF THIS APPENDIX



ENDORSEMENT

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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HYMAN RADZANOWER,	:	
	:	74 Civ. 3025 (LFM)
Plaintiff,	:	
-against-	:	
	:	<u>ENDORSEMENT</u>
TOUCHE, ROSS & CO., et al.,	:	
Defendants.	:	

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MacMahon, D. J.:

The within motion, pursuant to Rules 12(b) (2) and (3), Fed. R.Civ.P., for an order dismissing this action as to defendant First National Bank of Boston on the ground of improper venue, is granted.

Absent waiver or consent, a national bank may be sued only in the district in which it is established. 12 U.S.C. Section 94; Cope v. Anderson, 331 U.S. 461, 467 (1947); Klein v. Bower, 421 F.2d 338, 342 (2d Cir. 1970); Bruns, Nordeman & Co. v. American Nat'l Bank & Trust Co., 394 F.2d 300 (2d Cir.), cert. denied, 393 U.S. 855 (1968); Buffum v. Chase Nat. Bank of City of N.Y., 192 F. 2d 58 (7th Cir. 1951), cert. denied, 342 U.S. 944 (1952). Movant is established in Boston, Massachusetts, within the meaning of 12 U.S.C. Section 94, because its charter specifies

ENDORSEMENT

Boston as its principal place of business. Buffum v. Chase Nat. Bank of City of N.Y., supra, 192 F.2d at 60; Leonardi v. Chase Nat. Bank of City of N. Y., 81 F. 2d 19, 22 (2d Cir.), cert. denied, 298 U.S. 677 (1936); Southeast Guaranty Trust Co. v. Rodman & Renshaw, Inc., 358 F. Supp. 1001. 1004 (N.D. Ill. 1973); General Electric Credit Corp. v. James Talcott, Inc., 271 F. Supp. 699 (S.D.N.Y. 1966).

Movant's designation of the New York Superintendent of Banks to receive process on its behalf is not a waiver of this venue provision. Although the language of the designation is broad, it specifically evidences an intent to comply with Section 131(c) of the New York Banking Law, which requires such a designation before a foreign bank can operate in a fiduciary capacity in New York. This designation operates as a waiver of the venue provision only in actions involving movant's fiduciary acts in New York, and no such acts are alleged or involved here.

Accordingly, First National Bank of Boston's motion to dismiss this action on the ground of improper venue is granted in all respects.

So ordered.

Dated: New York, N. Y.  
October 21, 1974

(Spd) Lloyd F. MacMahon  
LLOYD F. MAC MAHON  
United States District Judge



NOTICE OF APPEAL

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK

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HYMAN RADZANOWER,

Plaintiff,

-against-

TOUCHE, ROSS & CO., TELEPROMPTER  
CORPORATION, JACK K. COOKE, RAYMOND :  
P. SHAFER, W.J. BRESNAN, H.J. :  
SCHLAFLY, LEONARD TOW, R.C. TODD, :  
JR., B.P. SIMON, J.B. GREEN, L.H. :  
READ, R.G. WILSON, H.E. FLAHERTY, :  
B.D. FISCHMAN, BERLE ADAMS, MARVIN :  
CARTON, R.F. LEWIS, P. L. LOWE, :  
CHARLES LUCKMAN, M.B. MITCHELL, :  
A.E. PLUCKETT, J.H. RICHARDSON, :  
M.E. LIVINGSTON, JACK WRATHER, :  
FIRST NATIONAL BANK OF BOSTON, :

Defendants.

74 Civ. 3025 (LFM)

NOTICE OF APPEAL

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S I R S:

PLEASE TAKE NOTICE that plaintiff herein appeals  
to the United States Court of Appeals for the Second  
Circuit, located at the United States Courthouse, Foley  
Square, New York, New York, from each and every part of  
an Order of the Honorable Lloyd F. MacMahon, United States  
District Judge, dated October 21, 1974, granting a motion  
by defendant First National Bank of Boston for an order

NOTICE OF APPEAL

dismissing this action as to it on the ground of  
improper venue.

IRA JAY SANDS

By (Sgd) Ira Sands  
Attorney for Plaintiff  
Office and Post Office Address  
701 Seventh Avenue  
New York, New York 10036  
(212) 265-3500

AND

SAMUEL GOTTLIEB  
GAINSBURG, GOTTLIEB, LEVITAN  
& COLE  
Co-Counsel for Plaintiff  
122 East 42nd Street  
New York, New York 10017  
(212) 697-3440

Dated: New York, New York  
November 15, 1974



STATE OF NEW YORK        )  
                              )  
COUNTY OF NEW YORK     )   ss.:

MANSFIELD ALEXANDER, being duly sworn, deposes  
and says:

That he is not a party to this action, is over  
eighteen years and resides in the State of New York.

On the 17th day of January, 1975, he served the  
within

JOINT APPENDIX

upon the  
following defendants or attorneys, at the addresses designated  
by them for that purpose by delivering to said addresses and  
leaving with an adult person therein, a true copy of same  
enclosed in a properly addressed wrapper.

Mansfield Alexander  
MANSFIELD ALEXANDER

TO: See attached sheet.

Sworn to before me this  
17th day of January, 1975.

Raymond Burrasca  
RAYMOND BURRASCA  
NOTARY PUBLIC, State of New York  
No. 30-4524706  
Qualified in Nassau County  
Commission Expires March 30, 1976





Samuel Gottlieb, Esq.  
Gainsburg, Gottlieb, Levitan & Cole  
122 East 42nd Street  
New York, New York 10017

Samuel Gates, Esq.  
Debevoise, Plimpton, Lyons & Gates  
299 Park Avenue  
New York, New York 10017